E. I. DuPont de Nemours and Company, Incorporated *and* Henry M. Burke. Case 32-CA-1737

July 20, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On May 19, 1980, Administrative Law Judge William J. Pannier III issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, E. I. DuPont de Nemours and Company, Incorporated, Antioch, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] See *Materials Research Corporation*, 262 NLRB 1010 (1982), issued this day.

DECISION

STATEMENT OF THE CASE

WILLIAM J. PANNIER III, Administrative Law Judge: This matter was heard by me in Oakland, California, on January 14, 1980. On September 7, 1979, the Acting Regional Director for Region 32 of the National Labor Relations Board issued a complaint and notice of hearing, based on an unfair labor practice charge filed on April 23, 1979, alleging violations of Section 8(a)(1) of the National Labor Relations Act, as amended, 29 U.S.C. § 151, *et seq.*, herein called the Act. All parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs. Based on the entire record, on the briefs filed on behalf of the parties, and on my observation of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT

I. JURISDICTION

At all times material, E. I. DuPont de Nemours and Company, Incorporated, herein called Respondent, has been a corporation duly organized under and existing by virtue of the laws of the State of Delaware, with an office and principal place of business located in Wilmington, Delaware, and a manufacturing facility located in Antioch, California, where it is engaged in the manufacture of chemicals. During the 12-month period prior to issuance of the complaint, Respondent, in the course and conduct of its business operations, sold and shipped goods or services valued in excess of $50,000 directly to customers located outside the State of California, and, additionally, purchased and received goods or services valued in excess of $50,000 directly from suppliers located outside the State of California. Therefore, I find, as admitted in the answer to complaint, that at all times material, Respondent has been an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Issue*

This case presents a question as to whether the doctrine enunciated in *N.L.R.B.* v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975), applies to a situation where an unrepresented employee requests the presence of a witness during an interview where the employer demands that he agree, in writing, to abide by the terms of a probationary employment program, imposed because of past deficiencies perceived by the employer in that employee's performance. I find that the *Weingarten* doctrine is applicable in such circumstances. I further find that by discharging the employee for refusing to sign such an agreement, after having denied his request for representation and after having insisted, nonetheless, that the employee continue the interview and sign the agreement, the Employer violated Section 8(a)(1) of the Act.

B. *Facts*

Henry M. Burke commenced working for Respondent on November 15, 1968, occupying the position of maintenance mechanic for the last 9 or 10 years before his termination on November 1, 1978.[1] During the last few months of his employment, Burke's relations with Respondent had been somewhat less than placid. Thus, as a result of an industrial accident on September 8, Burke had engaged in a running dispute with local management over the severity of his injuries, the propriety of the investigation being conducted, the assessment of responsibility for the accident determined by the investigation, and the amount of time that he had spent obtaining medical treatment for his injuries. Burke had filed a grievance

[1] Unless otherwise stated, all dates occurred in 1978.

pursuant to Respondent's in-house grievance procedure concerning these matters.[2] Earlier, he had filed a grievance concerning the assignments which he had received.

On October 30, Burke was suspended for refusing to sign a timecard which showed him as being docked for time which he had taken to obtain medical treatment. On the following day, he was directed to report to the office at 1 p.m. on November 1. When he did so, his immediate supervisor, William Reynolds,[3] read an interview record which listed the deficiencies, in Respondent's view, in Burke's performance during the preceding 19-month period. Such matters as his absences due to disabilities, his refusal to comply with OSHA regulations, and his grievances and "incessant chatter" while he was supposed to be working were among the items listed. Having finished reading the record to Burke, Reynolds directed him to sign the document, acknowledging that he had been informed of its contents. Consistent with his past practice, Burke declined to do so. Reynolds then summoned his immediate superior, Joseph McKee,[4] to serve as a witness to Burke's refusal to sign the record. So far as the record discloses, never in the past had Respondent sought a witness to Burke's refusal to sign an interview record. After McKee had arrived, Burke also requested a witness, but this request was disregarded.[5] When Burke continued to decline to sign the record, McKee directed Reynolds to sign it and to note that Burke had refused to do so.

McKee then produced a typed development program for Henry M. Burke. As is stated in Respondent's brief, this program provided, in essence, that Burke

> . . . would perform his work diligently, that he would not engage in excessive discussion of personal problems and outside activities during work time, that he would follow specified procedures for making medical appointments, that he would endeavor to have disability performance equal to the department average, that he would assume personal responsibility for compliance with safety rules and regulations, that he would adopt a cooperative attitude toward management with respect to the job and the correction of medical problems, and that his performance would be under daily scrutiny with monthly written reviews.

The final sentence of the program states: "I fully accept and agree to the development program outlined above."

After saying that this was a list of terms which Burke would have to observe if he wanted to continue working for Respondent, McKee began reading from the document. As McKee read, Burke interposed objections to the conditions. When McKee insisted that Burke listen to what was being read, Burke then asked for copies of both the interview record and of the development program, explaining that "I'd already been to the Labor Commissioner's Office and they told me to substantiate whatever I could as far as documents . . . ." However, Burke was reminded of Respondent's policy of not releasing documents. Burke then said, "If you won't give me the documents I would like a witness in here."[6] This request was also refused, even though Burke stated specifically that "All I would like is just anybody out there to be a witness who is not of supervision or on salary." When McKee had finished reading the program, Burke was instructed to sign it. Burke refused to do so unless he was accorded a copy or, if not that, a witness.[7] However, his requests were refused and when he continued to refuse to sign, he was terminated.

C. *Analysis*

The General Counsel argues that the foregoing facts show that Burke had a right to invoke the *Weingarten* doctrine during the November 1 meeting with McKee and Reynolds, and, further, that their insistence that Burke continue the meeting and execute the development program after having denied Burke's request violates Section 8(a)(1) of the Act. Inasmuch as his termination had resulted from his failure to execute the program in the face of Respondent's denial of his request for a witness, argues the General Counsel, the termination must also be found to have violated Section 8(a)(1) of the Act. Conversely, Respondent argues that the *Weingarten* doctrine is inapplicable in the circumstances of this case because the nature of the meeting was such that, without regard to the presence or absence of a statutory bargaining representative, an employee in Burke's situation would not have been entitled to representation. Respondent further contends that, even had Burke been entitled to invoke the *Weingarten* doctrine, his request, merely for a witness, falls short of the type of request that must be made by an employee to invoke the doctrine. Finally, even if an employee in Burke's situation had been entitled to request representation and even had a request for a witness been sufficient under the *Weingarten* doctrine, Respondent argues that the doctrine is limited to situations where there is a statutory bargaining representative, within the meaning of Section 9(a) of the Act, and is inapplicable to facilities and employees where no such rep-

[2] There is no recognized collective-bargaining representative at the facility where Burke had been working.

[3] At all times material, Reynolds had been a supervisor within the meaning of Sec. 2(11) of the Act and an agent of Respondent.

[4] At all times material, McKee had been a supervisor within the meaning of Sec. 2(11) of the Act and an agent of Respondent.

[5] In a pretrial affidavit, Burke made no specific mention of having requested a witness at this point during the interview. Rather, the affidavit recites only a later request, made when McKee had begun reading the development program. Nevertheless, when testifying, Burke continued to maintain that he had made this earlier request and Respondent produced no evidence to controvert Burke's assertion in this regard.

[6] Asked why he had requested a witness at this point, Burke testified:

> First of all, I would have been happy just to have a document as the Labor Commission's Office told me to get anything I could have in writing. When I was refused a document, then the next best thing I could have, and they told me I'd have to agree to this document or my job, these were conditions to my job at this time, that when I was refused a document, the next best thing I could have would be a witness to the fact that I was refused this document.

[7] As Burke explained it:

> With a witness in the room under—when they tricked me with termination, O.K., as the last straw I would have signed it with a witness in the room. Then I would have had something to substantiate that I did this without [sic] being under duress. Then I could have told the Labor Commission's Office what had happened with something to back me.

resentative is present. For the following reasons, I disagree with Respondent's arguments.

The parties stipulated that "upon being notified of the November 1, 1978 meeting with supervisors McKee and Reynolds, Burke had a reasonable expectation that that meeting would result in disciplinary action." The Supreme Court has sustained as being proper "[t]he Board's construction that creates a statutory right in an employee to refuse to submit without union representation to an interview which he reasonably fears may result in his discipline . . . ." *Weingarten, supra* at 256. Accordingly, in view of the existence of a reasonable expectancy of discipline in this case, as a general proposition, the General Counsel is correct in asserting that the basis for application of the *Weingarten* doctrine is present in the instant case.

However, the doctrine does not apply to all meetings, without limitation, between employers and employees. As it has evolved, the doctrine is limited or bounded by two types of meetings. The first such limitation is where the employer seeks only to engage in "run-of-the-mill, shop-floor conversations as, for example, the giving of instructions or training or needed corrections of work techniques." *Quality Manufacturing Company*, 195 NLRB 197, 199 (1972). There is no contention by Respondent that this limitation is applicable to the substance of the November 1 meeting. Nor could there be, inasmuch as Burke had been summoned to the office, from a disciplinary suspension, to listen to Respondent's final determination concerning the circumstances that had led to that suspension. Moreover, Burke's work had not been evaluated for the prior 19 months and the development program had been one especially created for Burke, setting forth employment conditions that other employees were not obliged to observe. Consequently, the meeting can be characterized neither as being "run-of-the-mill" nor as a "shop-floor" conversation.

The second type of meeting that serves as a limitation of the *Weingarten* doctrine is one "held solely for the purpose of informing the employee of, and acting upon, a previously made disciplinary decision." *Baton Rouge Water Works Company*, 246 NLRB 995 (1979). Respondent argues that the November 1 meeting was of this type. Of course, it was convened for disciplinary purposes. However, such a characterization or description of the meeting is not dispositive of the applicability of the *Weingarten* doctrine, for "the full purview of protections accorded employees under *Weingarten* apply to both 'investigatory' and 'disciplinary' interviews, save only those conducted for the exclusive purpose of notifying an employee of previously determined disciplinary action." *Baton Rouge Water Works, supra*. Thus, characterizations or descriptions of the type of meeting being conducted do not serve as the correct test for determining the applicability of the *Weingarten* doctrine. Rather, the correct test for making that determination is whether the employers limit the scope of the meetings to informing employees of disciplinary decisions and to ensuring that employees understand "the reasons for disciplinary action, their concurrence therewith aside." *Texaco, Inc.*, 246 NLRB 1021 (1979). "[I]f the employer engages in any conduct beyond merely informing the employee of a previously made disciplinary decision, the full panoply of protections accorded the employee under *Weingarten* may be applicable." *Baton Rouge Water Works, supra.*

Here, had Respondent done no more than read the interview record and development program to Burke and demand that he comply with the terms of the latter, it might well be that the meeting would properly be categorized as one conducted for no more than disciplinary notification. But, Respondent did do more. It insisted initially that Burke sign the interview record. When, consistent with his own past practice, Burke declined to do so, Reynolds took the unprecedented, so far as the record discloses, step of summoning McKee to witness that fact. Then, when Burke still would not sign the record, McKee produced a development program, especially tailored for Burke, to govern the terms of his future employment with Respondent. In its brief, Respondent claims that the conditions imposed in the program had been predetermined. That seems clear from the fact that it was produced in typewritten form during the meeting with Burke. Yet, Respondent has produced no evidence that would show that it had made an unalterable decision to actually produce the development program no matter what Bruke did with respect to the request that he sign the interview record. To the contrary, McKee, who had been the official to produce and read the terms of the development program to Burke, had not attended the first part of the meeting, during which Reynolds had reviewed the interview record with Burke. Only when the latter had refused to sign the record did McKee appear on the scene as a "witness." And only when Burke persisted in declining to sign the record did McKee then take over the meeting and produce the development program. Consequently, in the absence of any evidence to the contrary, there is a firm basis for inferring that the decision to actually utilize the typed development program had not been unalterably predetermined, but rather had been contingent upon Burke's reaction when requested to sign the interview record.

Furthermore, as had been the fact regarding the interview record, McKee did not simply read the development program to Burke and inform him that he would be subject to its terms. Instead, he insisted, on pain of discharge for not doing so, that Burke sign the program, thereby specifically accepting and agreeing to its terms. Yet, the signing of such an acceptance and agreement by an employee plays no role in the announcement of disciplinary action. Nor, at least in the circumstances present here, does it serve to aid in promoting understanding by an employee of the nature and reasons for the discipline being imposed. Rather, by acknowledging that he had accepted and agreed to the terms of the program, as signified by his signature on it, Burke potentially was being placed in a position where Respondent could later assert that his signature on the program served to indicate his admission that his past conduct, as described in the interview record, had been deficient and, further, indicated agreement to the propriety of the conditions imposed by the program. In short, by signing the development program, Burke would be running the risk of undermining any objection to imposition of its terms that he might

later raise in proceedings to contest their propriety, such as in the course of processing an in-house grievance or before the labor commissioner.

The signing of statements during a meeting with management is among the examples advanced by the Board as constituting conduct that goes beyond that which is necessary for notification and explanation of discipline. *Baton Rouge Water Works, supra*. True, in that case, the Board spoke of somewhat different types of statements than the interview record and development progam presented to Burke on November 1. Nevertheless, in *Baton Rouge*, the Board was merely providing illustrations of the types of statements that would exceed the scope of the disciplinary notification and explanation limitation to the *Weingarten* doctrine. There was no indication that it intended those illustrations to be all inclusive. One of the policies underlying the *Weingarten* doctrine is the protection of employees' positions in future proceedings pertaining to the propriety of discipline imposed. True, in so saying, both the Board and the Supreme Court had been contemplating grievance and arbitration proceedings created by collective-bargaining agreements. Yet, here, Respondent did have an in-house grievance procedure created to serve the same function—resolving disputes between Respondent and its unrepresented employees. Moreover, proceedings before the labor commissioner are part of the employment legislation created to regulate labor disputes. "The Board must recognize the purposes and policies of other employment legislation, and construe the Act in a manner supportive of the overall statutory scheme." *Alleluia Cushion Co., Inc.*, 221 NLRB 999, 1000 (1975). Consequently, the potential effect of Burke's signature on the development program in proceedings before the labor commissioner, as well as in proceedings initiated under Respondent's in-house grievance procedure, is as significant to his Section 7 rights as it would be in assessing an employer's position in a grievance procedure arising from a collective-bargaining agreement. That is, the concern remains the same notwithstanding the difference in forum.

In sum, *Weingarten* and its progeny articulate a Section 7 right applicable to all meetings between employers and employees whenever the latter have a reasonable expectancy that disciplinary action may result. Burke had such an expectancy. While meetings to inform an employee of disciplinary action fall outside the ambit of the *Weingarten* doctrine, such meetings, as is true of any limitation or exception to statutory rights, must be strictly limited to the purpose for which the limitation or exception exists: that is, to notifying and explaining the discipline being imposed. Where, during a meeting with management, an employee is obliged to take action that may, as in the case of Respondent's insistence that Burke sign the interview record, result in further disciplinary action, such as imposition of the conditions of the development program when Burke declined to sign the interview record, and that may undermine that employee's position in subsequent proceedings to determine the propriety of discipline imposed, such as the effect of signing an agreement to the terms imposed by the development program might have on Burke's position in an in-house grievance proceeding or before the labor commissioner, that meeting ceases to be confined to simply notification and explanation of discipline. Rather, it becomes a meeting which the inequality of bargaining power between employees and employers entitles "a lone employee" to protection from being required to attend without representation. *Weingarten, supra* at 262.

This then leads to consideration of Respondent's next contention: that Burke's request for a "witness" fails to satisfy the *Weingarten* requirement that "the right arises only in situations where the employee requests representation." *Weingarten, supra* at 257. The credible evidence produced at the hearing shows that Burke made requests for a witness at two points during the November 1 meeting. The first occurred at the time that McKee had entered the room, having been summoned to "witness" Burke's refusal to sign the interview record. Burke's continued refusal to sign had then led to production of the development program. The second request occurred during the course of the reading of the development program.[8] Burke admitted that he had not sought a witness for the purpose of obtaining advice. Rather, he testified that he had sought a witness for substantiation of the terms of the interview record and development record, having been previously instructed by the labor commissioner to obtain copies of documents of this type, and, further, for the fact that any signature which he placed on the development record had not been the product of voluntary agreement to its terms. Based, essentially, on Burke's use of the term "witness" and upon the individually oriented and limited reasons for which he had made the requests, Respondent argues that Burke's requests simply did not rise to the level of the type of request for "representation" necessary to invoke the *Weingarten* doctrine. I do not agree.

"The employer has no duty to bargain with the union representative at an investigatory interview." *Weingarten, supra* at 260. Consequently, it is obvious that the "representation" contemplated by the *Weingarten* doctrine is less than that accorded a statutory bargaining representative under Section 9 of the Act. Both the Supreme Court in *Weingarten* and the Board in subsequent cases have advanced examples of the role that could be played by that "representative." "Indeed, the union representative's role is limited to assisting the employee and possibly attempting to clarify the facts or suggest other employees who may have knowledge of them." *Anchortank, Inc.*, 239 NLRB 430 (1978). Yet, these examples of the function that a representative could play are merely illustrations. At no point has either the Board or the Supreme Court precluded the "representative" from serving as a witness

[8] Respondent argues that because Burke failed to make his request at the very commencement of McKee's reading of the development program, after McKee had specifically put Burke on notice that a "strong commitment" from Burke was being sought in order for Burke to be allowed to continue employment with Respondent, that Burke had somehow waived any *Weingarten* right that he might otherwise have possesed, and that Respondent was not thereafter obliged to interrupt the reading of the development program to secure a witness for Burke. There is no merit to that argument. The standard for waiver of a statutory right, "clear and unmistakable," *The Timken Roller Bearing Company* v. *N.L.R.B.*, 325 F.2d 746, 751 (6th Cir. 1963), cert. denied 376 U.S. 971, can hardly have been said to have been met by, in essence, Burke's initial silence when first advised of the existence of the development program.

during the meeting with the employer. To the contrary, in his dissenting opinion, with which Justice Stewart joined, Justice Powell specifically referred to such a role as being one which the *Weingarten* "representative" might perform: "The new right thus appears restricted to the privilege to insist on the mute and inactive presence of a fellow employee or a union representative: a witness to the interview, perhaps." *Weingarten, supra* at 273, fn. 5. Similarly, the Board has agreed with the proposition that "no particular title need be held by the representative; he may be no more than a witness, in a proper case." *Crown Zellerbach Inc., Flexible Packaging Division*, 239 NLRB 1124 (1978).

True, as pointed out above, the representative can serve functions other than merely that of a witness, under the *Weingarten* doctrine, during the meeting with management. Yet, neither the Supreme Court nor the Board has ever held that the representative *must* do so. If the employee that is the target of potential discipline or, for that matter, if the representative, himself, decides to confine his role to no more than witnessing what is occurring, that should not deprive the employee of the Section 7 right to which he is otherwise entitled under *Weingarten*. Indeed, where, as is the fact here, the employee's concern is with the effect that his act of signing a document may have in subsequent proceedings, contesting the propriety of the discipline imposed in that document, the function of witnessing may be the most crucial one that the *Weingarten* representative can serve. For example, should it later be argued that no challenge could be made to the propriety of the development program's terms because Burke had agreed to abide by them, the presence of a witness would serve to fortify Burke's position that his signature did not mean that he had agreed voluntarily to have his employment governed by these terms, but rather that he had signed solely to avoid being discharged for not doing so.

In sum, an employee should not be deprived of a right, under the *Weingarten* doctrine, to which he would otherwise be entitled, simply because he chooses not to have the "representative" exercise the full range of functions which that representative could exercise under the *Weingarten* doctrine. Moreover, the fact that Burke requested a witness, rather than a representative, during the meeting should not serve to deprive him of his right to a *Weingarten* representative. He specifically made clear that his concern had been with potential proceedings before the labor commissioner. Both McKee and Reynolds were aware of Burke's willingness to use the in-house grievance procedure; a past grievance was among the complaints enumerated in the interview record. Clearly, they understood the purpose of his request. Yet, they rejected it. In these circumstances, Burke should not be penalized simply because he "had to speak for [himself] as best [he] could." *N.L.R.B.* v. *Washington Aluminum Co.*, 370 U.S. 9, 14 (1962). Therefore, I find that Burke's request for a witness did suffice to constitute a request for representation within the meaning of *Weingarten.*

Having determined that the *Weingarten* doctrine was applicable to the November 1 meeting and that Burke's request for a witness sufficed to invoke his rights under that doctrine, there remains for consideration the issue of whether the Section 7 right enunciated in *Weingarten* applies in situations where there is no collective-bargaining representative.[9] Even a cursory reading of *Quality Manufacturing, supra*, and *Weingarten, supra*, discloses that "the right inheres in [Section] 7's guarantee of the right of employees to act in concert for mutual aid and protection." *Weingarten, supra* at 256. The right to engage in concert for mutual aid and protection, of course, is not dependent on the existence of a statutory bargaining representative. Consequently, under basic statutory principles, neither would application of the *Weingarten* doctrine. Indeed, the Board has expressly so stated: "We conclude that Section 7 rights are enjoyed by all employees and are in no wise dependent on union representation for their implementation." *Glomac Plastics, Inc.*, 234 NLRB 1309, 1311 (1978). So, too, did Justices Powell and Stewart:

> While the Court speaks only of the right to insist on the presence of a union representative, it must be assumed that the [Section] 7 right today recognized, affording employees the right to act "in concert" in employer interviews, also exists in the absence of a recognized union. [*Weingarten, supra* at 269, fn. 1.]

To apply the *Weingarten* doctrine to unrepresented employees, as well as to those who are represented, is not irrational. As noted above, even a statutory representative may not engage in bargaining during the course of the interview. Accordingly, the full powers of a statutory representative are not needed to fulfill the role contemplated by the Court and the Board under the *Weingarten* doctrine. Further, many of the illustrations of functions that a representative could perform in such a meeting—such as advising the employee being interviewed, eliciting favorable facts, and aiding in getting to the problems of the incident—could just as readily be performed in the absence of a statutory representative. Indeed, in this case, a nonstatutory bargaining representative could just as readily have performed the witness function that Burke felt he would need for later proceedings before the labor commissioner. Finally, the absence of a statutory bargaining representative does not mean that requiring "a lone employee" to attend an interview with his employer perpetuates the inequality of his bargaining power, *vis-a-vis* his employer, any the less than it would in the case of a represented employee. See *Weingarten, supra* at 262. The same inequality exists in both situations, just as Section 7 of the Act accords rights both to represented and unrepresented employees. Therefore, I find that the *Weingarten* doctrine applies to employees who are not represented by a statutory bargaining representative.

Respondent's brief also argues that there was no concerted activity involved in this case, because Burke had sought only to vindicate his own self-interest and, so far

[9] To date, two administrative law judges have issued decisions addressing this issue. In *Materials Research Corporation*, JD-(NY)-10-80, it was concluded that the doctrine did not apply to unrepresented employees. Conversely, in *Sears, Roebuck and Co.*, JD-(SF)-120-80, Administrative Law Judge Richard D. Taplitz concluded that it did.

as the record discloses, had been unconcerned with the rights of other employees employed by Respondent. Such an argument misconceives the nature of Burke's situation. True, his immediate concern was with the circumstances confronting him and with their effect on his future employment situation with Respondent. Yet, in asking for another nonsupervisory, nonsalaried employee to accompany him, he was seeking to act in concert with another employee. There is no rule requiring that every employee in the plant be involved for activity to be concerted. Moreover, while other employees might not have been overly concerned with Burke's particular problem, they all are susceptible to being called to meetings with Respondent's officials at which they may seek a representative under the *Weingarten* doctrine. Consequently, while an employee summoned to serve as Burke's witness might not have a direct interest in the disposition of Burke's case, by being present he assured "himself, in case his turn ever [comes], of the support of the one that [he was] then helping . . . ." *N.L.R.B.* v. *Peter Cailler Kohler Swiss Chocolates Company, Inc.*, 130 F.2d 503, 505–506 (2d Cir. 1942). He also would be assured of the protection accorded by the *Weingarten* doctrine.

Finally, the parties stipulated that Burke had not been terminated because of his request for representation. However, he was terminated because he had refused to participate in the interview in the manner demanded by Respondent. That is, Burke refused to sign the development record. Under *Weingarten*, once the employee requests the presence of a representative and that request is refused, the employer is obliged to discontinue the interview or, alternatively, to offer the employee the choice of continuing the interview without a representative or having no interview at all. See, e.g., *Roadway Express, Inc.*, 246 NLRB 1127 (1979). Here, Respondent did neither. Instead, it insisted that Burke continue the interview and sign the program, without the benefit of a witness. In so doing, Respondent violated Section 8(a)(1) of the Act. When it then discharged Burke for refusing to sign the development program, after having denied his requests for a witness, it also violated Section 8(a)(1) of the Act. For, had Respondent observed the obligations imposed upon it by the *Weingarten* doctrine, it should have, at least, offered Burke the opportunity to forego further participation in the meeting and, in any event, could not, without according him a witness, have insisted on continuing the meeting by demanding that he sign the development program.

III. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of E. I. DuPont de Nemours and Company, Incorporated, set forth above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead, and have led, to labor disputes burdening and obstructing commerce and the free flow of commerce.

CONCLUSIONS OF LAW

1. E. I. DuPont de Nemours and Company, Incorporated, is an employer within the meaning of Section 2(2) of the Act, engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. By requiring that an employee participate in an employer interview or meeting without representation, when such representation had been refused and when the employee had reasonable grounds to believe that the matters to be discussed might result in his being the subject of disciplinary action, and by discharging that employee for refusing to participate in that interview or meeting in the manner prescribed, by signing an agreement to abide by special employment terms, following denial of his request for representation, E. I. DuPont de Nemours and Company, Incorporated, violated Section 8(a)(1) of the Act.

3. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act

THE REMEDY

Having found that E. I. DuPont de Nemours and Company, Incorporated, has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action to effectuate the policies of the Act.

E. I. DuPont de Nemours and Company, Incorporated, will be required to offer Henry M. Burke immediate reinstatement to his former position of employment or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, dismissing, if necessary, anyone who may have been hired to perform the work that he had been performing prior to November 1, 1978. Additionally, E. I. DuPont de Nemours and Company, Incorporated, will be required to make Burke whole for any loss of earnings he may have suffered by reason of his unlawful termination, with backpay to be computed as prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and with interest to be paid on the amount owing in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1970); see, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), enforcement denied on different grounds 322 F.2d 913 (9th Cir. 1963).

Upon the foregoing findings of fact and conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[10]

The Respondent, E. I. DuPont de Nemours and Company, Incorporated, Antioch, California, its officers, agents, successors, and assigns, shall:

[10] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

1. Cease and desist from:

(a) Requiring that employees participate in employer interviews or meetings without representation, when such a request has been refused and when the employees have reasonable grounds to believe that the matters to be discussed may result in disciplinary action.

(b) Discharging or otherwise disciplining employees who have been required to participate in employer interviews or meetings without representation, when such a request has been refused and when the employees have reasonable grounds to believe that the matters to be discussed may result in disciplinary action, because those employees have refused to sign documents or take other action during the meetings, as directed, following the denial of their requests for representation.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action deemed necessary to effectuate the policies of the Act:

(a) Offer Henry M. Burke immediate and full reinstatement to his former position of employment, dismissing, if necessary, anyone who may have been hired or assigned to perform the work that he had been performing prior to November 1, 1978, or, if his former position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay he may have suffered as a result of the discrimination, in the manner set forth above in the section entitled "The Remedy."

(b) Preserve and make available to the Board or its agents all payroll and other records necessary to compute the backpay and reinstatement rights set forth in The Remedy section of this Decision.

(c) Post at its Antioch, California, facility copies of the attached notice marked "Appendix."[11] Copies of said notice, on forms provided by the Regional Director for Region 32, after being duly signed by its authorized representative, shall be posted by it immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by E. I. DuPont de Nemours and Company, Incorporated, to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 32, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all parties had an opportunity to present evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act and we have been ordered to post this notice.

The Act gives all employees the following rights:

To organize themselves

To form, join, or support unions

To bargain as a group through representatives of their own choosing

To act together for collective bargaining or other mutual aid or protection

To refrain from any or all such activity except to the extent that the employees' bargaining representative and employer have a collective-bargaining agreement which imposes a lawful requirement that employees become union members.

WE WILL NOT require you to further participate in an interview or meeting with us without the presence of another employee, when you reasonably believe that the matters to be discussed in that interview or meeting may result in disciplinary action being taken against you, and where we have refused your request for the presence of a representative, witness, or another employee.

[11] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall to read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT, where you have been required to participate in an interview or meeting with us without the presence of a representative, witness, or another employee and where we have refused your request that a representative, witness, or another employee attend because you reasonably fear that the matters to be discussed may result in disciplinary action, discharge or otherwise discipline you for refusing to sign documents or to take other action which we direct you to take during that meeting.

WE WILL NOT in any like or related manner interfere with any of your rights set forth above which are guaranteed by the National Labor Relations Act.

WE WILL offer Henry M. Burke immediate and full reinstatement to his former position, dismissing, if necessary, anyone who may have been hired or assigned to perform the work which he had been performing prior to the time that he was terminated on November 1, 1978, or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay he may have suffered as a result of our discrimination, with interest.

E. I. DUPONT DE NEMOURS AND COMPANY, INCORPORATED